BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of	)	
	)	
PUBLIC UTILITIES COMMISSION	)	DOCKET NO. 2008-0273
	)	
Instituting a Proceeding to Investigate the Implementation of Feed-in Tariffs.	)	
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TAWHIRI POWER LLC'S
PRELIMINARY RESPONSES TO THRESHOLD LEGAL QUESTIONS IN APPENDIX C OF SCOPING PAPER

AND

CERTIFICATE OF SERVICE

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IN APPENDIX C OF SCOPING PAPER

TO THE HONORABLE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII:

Pursuant to the Hawaii Public Utilities Commission's (the "Commission") directive TAWHIRI POWER LLC ("TPL") hereby submits to the Commission its Preliminary Responses to the Threshold Legal Questions in Appendix C of Scoping Paper on feed-in Tariffs, "Feed-in Tariffs: Best Design Focusing Hawaii's Investigation", issued by the Commission on December 11, 2008. Please note because this investigatory proceeding has just begun, it would be premature for TPL to have conducted a thorough legal analysis of the issues herein prior to its review of the documents, and other information, anticipated to be submitted in this Docket pursuant to the procedural order and schedule yet to be developed by the Commission. As such, TPL respectfully reserves its right to amend its responses herein depending upon the future submissions in this Docket.

Threshold Issues (Legal)

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:

a) Is this result permissible under current Hawaii statutes?

Response: It is unclear. On the one hand, HRS § 269-27.2 (c) provides "The rate payable by the public utility to the producer for the nonfossil fuel generated electricity supplied to the public utility shall be as agreed between the public utility and the supplier and as approved by the public utilities commission . . ."

On the other hand, if the parties are unable to agree upon a rate for the energy to be purchased, "[i]n the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the [C]ommission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy." HRS § 269-27.2(c) [Emphasis added]). Because TPL's understanding is that the proposed feed-in tariff to be considered by the Commission in this proceeding would be solely applicable to "nonfossil fuel generated electricity" supplied to the HECO Companies, TPL believes that the language of HRS § 269-27.2(c) appears to restrict the Commission from approving and adopting a feed-in tariff that exceeds the utility's avoided cost.

b) Does HRS § 269-27.2 create a ceiling on the feed-in tariff price?

Response: No, provided the feed-in tariff price is agreed upon by the public utility and the producer of the nonfossil fuel generated electricity, and approved by the Commission. However, in approving that price, the Commission is reminded that if the situation were such that the Commission would be required to establish that price because the parties failed to agree upon the same, it cannot be more than one hundred percent of the utility's avoided costs. See response to Part a above.

c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

Response: A higher feed-in tariff price would not necessarily violate the statute

provided it was mutually agreed upon by the parties. Nonetheless, in view of the restrictions of HRS § 269-27.2, best practices suggest the utility's estimates of its' avoided costs should be accurate and the feed-in tariff rate, on average over time, be no higher than the projected avoided costs.

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.

a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:

i) evidence of actual costs to develop similar projects in Hawaii

ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology

iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

Response: Any proposed feed-in tariff must be supported by methodologies and calculations that can be verified by all parties in a transparent environment.

b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it [to] the Commission, under the procedural schedule proposed by the signatories?

Response: See TPL's proposals and recommendations for the gathering of evidence and presentation to the Commission in its Response to NRRI Paper on Feed-in Tariffs prepared by Dr. Mohamed M. El-Gassier filed herein on December 31, 2008.

3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.

a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

Response: No, there is no violation of PURPA because the United States Supreme Court has previously declined to overrule a decision by the New York Court of Appeals that upheld a New York State Law that required utilities to purchase power at a rate that exceeded avoided costs. See Consolidated Edison Co. of New York, Inc. v. Public Service Com'n of State, 63 N.Y. 2d424, 483 N.Y.S. 2d 153 (1984), *appeal dismissed*, Consolidated Edison Company of New York, Inc. v. Public Service Commission of New, 470 U.S. 1075, 105 S.Ct. 1831 (1985) [Appeal dismissed for want of a substantial federal question]. Footnote 8 of the New York Court of Appeals decision recognized that

> **FERC left the States free to utilize their own means of encouraging alternate energy production**, stating:"The Commission has become aware that several States have enacted legislation requiring electric utilities in that State to purchase the electrical output of facilities * * * at rates which may differ from the rates required under the Commission's rules implementing section 210 of PURPA."This Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, **the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies**. However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal Law."If a State program were to provide that electric utilities must purchase power from certain types of facilities, among which are included 'qualifying facilities,' at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, **the higher rates would be based on State authority to establish such rates, and not on the Commission rules**. * * *"The Commission finds no inconsistency in a facility's taking advantage of section 210 in order to obtain one of its benefits, while relying on other authority under which to buy from or sell to a utility." (Preamble to FERC Rules, 45 Fed Reg 12214, 12221-12222.)

63 N.Y.2d at 437 [Emphasis added].

Finally, in order to increase the chances of success in the adoption of feed-in tariffs and recognizing the requirements of HRS § 269-27.2, the best course of action is to ensure that the determination of the utility's avoided costs are accurate, fair and transparent. This approach may reduce, or even eliminate, future price gaps between the feed-in tariff rates and avoided cost rate.

b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal to cost it would have incurred under the state-mandated feed-in tariff?

Response: This issue need not be addressed as explained in Part a of this Question No. 3. In any event, TPL believes the methodology currently employed by the HECO Companies in determining its avoided cost should be revisited in a fully transparent manner to facilitate the proceedings in this Docket. Finally, this question should not be qualified by the parenthetical because the utility's avoided cost as calculated prior to the existence of the tariff is still in discussions.

c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

Response: In a perfect world, the feed-in tariff rate offers the developer more certainty in regards to price. The developer does not have to spend time negotiating a Power Purchase Agreement ("PPA") with the public utility over the utility's avoided costs. Moreover, depending upon the formulation of the feed-in tariff rates, there may be greater price certainty over the term of the PPA under that scenario, than receiving payments based upon short-term avoided costs for "as available" energy. This certainty, in turn, reduces the cost of financing renewable projects. Furthermore, since the Commission has already approved the feed-in tariff with input from the Consumer Advocate, it could also reduce the time to secure the Commission's approval of the PPA.

d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

Response: Feed-in tariffs and existing PURPA rights are two (2) distinct mechanisms to encourage renewable energy development and utilization in the State of Hawaii, and one should not be eliminated because of the adoption of the

other. Neither should the emphasis on new renewable energy development in the State of Hawaii result in the curtailment and/or demise of existing renewable energy projects in the State of Hawaii. Finally, TPL believes the current methodology for estimating future avoided costs in a fair and fully transparent manner should be revisited. Accurate determination of the HECO Companies' actual avoided costs is the bedrock upon which these two (2) mechanisms can efficiently and effectively interact.

Respectfully submitted.

DATED: Honolulu, Hawaii, January 12, 2009.

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The foregoing Preliminary Responses to the Threshold Legal Questions in Appendix C of Scoping Paper was served on the date of filing by hand delivery or electronically transmitted to each such Party.

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